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Supreme Court of the United States

OCTOBER TERM, 1941

No. 67.

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR REHEARING.

HARRY DOW,
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No. 67.

SOUTHPORT PETROLEUM COMPANY,
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VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States:

Now comes the Southport Petroleum Company, petitioner herein, and respectfully presents its Petition for Rehearing, and, in support thereof, lists the following grounds:

First Ground.

This Honorable Court erred in failing to resolve the conflict existing in the decision of the Circuit Court of Appeals for the Fifth Circuit, in this case, 117 F. 2d 90 (C. C. A. 5), and the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F 2d 449 (C. C. A. 2).

In each case, a corporation was dissolved after the Board issued its order against such corporation.

In each case, the Statutes of the respective States wherein the corporations operated, provided that the corporation should be presumed to continue to exist for three years after the dissolution.

The Fifth Circuit Court held that, "conceding that the dissolution has taken place, it can have no effect upon this proceeding"; whereas, the Second Circuit Court held, under similar state of facts, that, "an order which required for its compliance the continuation of such respondent's business, as, for instance, the reemployment of unlawfully discharged employees, might well be beyond the power of the Board * * *."

Second Ground.

The decision of this Honorable Court is in conflict with the holding of this Honorable Court in the case of *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, wherein this Court held:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Third Ground.

This Honorable Court erred in failing to hold that, under the Texas Statutes dealing with the dissolution of a corporation, the only kind of judgment which may be rendered against a dissolved corporation is a money judgment, to which the assets of the corporation may be subjected.

This Honorable Court cited Articles 1388, 1389 and 1390, but failed to cite Article 1391,* which should be

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*Article 1391. "Suit on claim.—When no receiver has been appointed for said corporation, suit may be instituted on any claim against said corporation, as though the same had been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved, and judgment may be rendered as though the corporation had not been dissolved, *and the assets of said corporation shall be liable for the payment of such judgment* just as if said corporation had not been dissolved" (italics supplied).

read and construed with the aforementioned articles, and which Article 1391 provides that the judgment rendered against a dissolved corporation shall be such a judgment for which "the assets of said corporation shall be liable."

The Texas Statutes do not authorize a judgment against a dissolved corporation which would require such corporation to resume operations.

Fourth Ground.

This Honorable Court erred in basing its majority opinion on such suspicions reflected by the statement that the allegation in the affidavit of the Southport Petroleum Company, "does not negative either the possibility that the stock in the Delaware corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the Texas corporation, or its Stockholders, or that its stock was held by straw men," because there is nothing in the record to justify such suspicion, and this Honorable Court should not indulge in such possibilities; particularly, since the petitioner, by its verified motion, was begging the Court to remand the case to the Board where a complete hearing could be held before an Examiner appointed by the Board, where both the petitioner and the Board could adduce evidence on the *bona fides* of the dissolution.

Fifth Ground.

This Honorable Court erred in holding, "the record makes it certain that it (referring to Petitioner), would gain delay by all honest means and leaves it doubtful whether it has ever stopped at that," because a careful examination of the record will reflect that the delay was due to the conduct of the Board by reason of the following:

(a) The Board's order dated August 4, 1938 (Tr. of Rec. p. 84), required the Regional Director to hold an elec-

tion within 15 days from its date. The election was indefinitely postponed.

(b) The Board waited ten months to procure a stipulation from the Petitioner. Since the Petitioner dissolved three days after the stipulation, the Petitioner could not carry out that part of the stipulation requiring reinstatement of three employees. The stipulation relieved the Petitioner of the obligation to make whole the discharged employees.

(c) The Board waited twenty months after the date of its order, before filing its petition in the Circuit Court to enforce its order.

This Petitioner, therefore, submits that the action of the Board lulled the respondent into a feeling of complacency; and that the delay may be blamed on the Board, for it could have filed its petition for enforcement, thirty days after the Board entered the order, whereas, it waited twenty months. It follows that the inference contained in the above quotation, made by this Honorable Court against the petitioner, does petitioner a grave injustice.

Sixth Ground.

This Honorable Court erred in not remanding the case to the Board, but, nevertheless, holding that the question of whether there was a *bona fide* dissolution and a true change of ownership was a question of fact to be resolved by the Board "on direct resort to it," because, after the petition was filed in the Circuit Court, the only action which the petitioner could take, according to the terms of the National Labor Relations Act, was to file the motion and affidavit which it filed, as required by Section 10 (e) of the Act. The Court had acquired jurisdiction, and the petitioner properly addressed its request to the Court to remand the case to the Board to make this proof.

Seventh Ground.

In view of the Board's position in this case, this Honorable Court erred in not modifying and affirming the judgment of the Circuit Court of Appeals, by eliminating 2 (a) and 2 (c) from the Board's order, said provisions requiring an affirmative compliance of reinstating and the posting of notices, and by not limiting the make whole order to June 30, 1939, the date of the discontinuance of operations by the petitioner.

STATEMENTS, ARGUMENTS AND AUTHORITIES IN SUPPORT OF THE ABOVE GROUNDS.

Statement, Argument and Authorities under First, Second and Third Grounds.

By its verified motion, the petitioner alleged that it, in good faith, discontinued operations on June 30, 1939, and duly dissolved its corporation. This took place after the date of the Board's order and, therefore, it could not have been presented as evidence before the Board. If the dissolution was in good faith, the petitioner contends that it could not reinstate employees, for it had no plant wherein to reinstate employees.

The decision in the case of *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449 (C. C. A. 2), points out that the Board has no authority to require reinstatement of employees where the corporation has dissolved. In that case, as in the case at bar, the corporation was dissolved after the Board entered its order. In that case, the Circuit Court of Appeals properly remanded the case to the Board.

The Texas Statutes, Articles 1388, 1389, 1390 and 1391, do not authorize a judgment which would require a dissolved corporation to continue operations. The only kind of judgment which can be entered against a dissolved

corporation is a money judgment. The Honorable Circuit Court of Appeals for the Fifth Circuit, in support of its decision that the dissolution of the Texas corporation could have "no effect upon this proceeding," cited the cases of:

Chevrolet Motor Co. of Texas v. *Morris Auto Co.*, (Tex. Civ. App.) 269 S. W. 872; and

Eastman Gardiner & Co. v. *Warren*, (5th Circuit) 109 F. 2d 193.

The first case was a suit on a contract, whereby plaintiff sought to procure a money judgment against a dissolved corporation, and the second case was a tort action for damages against a dissolved corporation. In both cases, only money judgments were sought and, therefore, are not pertinent to the issues in this case.

The matter of remanding causes for further proceedings is rather common, as was pointed out by Chief Justice Hughes, in the case of *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

A remand was made by this Honorable Court in the case of *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, and in the case of *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241.

Both in the Ford case and in the Newport News case, the remand was granted at the request of the Board.

A remand to the Board is the only procedure provided by the terms of the National Labor Relations Act, Section 10 (e), whereby additional evidence may be made a part of the record and form the basis of a proper judicial determination.

The evidence was certainly material, for no Court would enter an order requiring reinstatement and posting of notices against a corporation which operated no plant and could, therefore, not reemploy or post notices. Even the Board conceded this proposition; for it concedes in its

Brief (page 24) that the order does not require the petitioner to repurchase an oil refinery and resume operations.

Statement, Argument and Authorities under Fourth, Fifth, Sixth and Seventh Grounds.

Even a casual reading of the majority opinion of this Honorable Court will reflect that it is not based on what is in the record, but possibilities which may be suspicioned outside of the record.

The position of the petitioner should negative the suspicion of such possibilities, for, if the petitioner were guilty of creating a "sham dissolution," it stands to reason that petitioner would not file its motion for the purpose of adducing evidence, which would prove an improper dissolution. Furthermore, if the Board were of the opinion that the dissolution was not in good faith, it would have joined in the motion to remand the case to the Board and made the Delaware corporation a party to the proceedings, as was done in the case of *National Labor Relations Board* v. *Hopwood Retinning Corp.*, 98 F. 2d 97; 104 F. 2d 302 (C. C. A. 2). In that case the Hopwood Corporation conveyed all of its assets to the Monarch corporation for the purpose of evading a Board order, and the Board, by proper proceedings, brought both corporations before it and had the order entered against both corporations.

Likewise, in the case of *Bethlehem Steel Co. et al.* v. *National Labor Relations Board*, 120 F. 2d 641 (App. D. C.), both the parent corporation and the dominated subsidiary corporation were properly made parties to the proceedings, and required to obey an order of the Board.

On the other hand, in the companion cases of *Press Co., Inc.*, v. *National Labor Relations Board* and *Gannett Co.* v. *National Labor Relations Board*, 118 F. 2d 937 (l. c. 947) (C. App. D. C.), wherein the facts developed that

one corporation was not guilty of violating the National Labor Relations Act, the order was properly enforced against the other corporation guilty of unfair labor practices.

If the petitioner's motion were granted and the case remanded to the Board and both the Texas and the Delaware corporations made parties to the proceeding, both corporations and the Board would, in the proper forum, have an opportunity to present evidence, and on such evidence a definite order could be entered.

Petitioner knows that such evidence would definitely establish that the liquidating dividend was declared in good faith; that the dissolution was in good faith, and that the Delaware corporation was not an *alter ego* or agency or dominated subsidiary of the Texas corporation, but was a separate, independent entity, and the only reason for retaining the name "Southport" was because the Texas corporation had marketed gasoline under such trade-name, and the new Delaware corporation continued marketing the same product under the same trade-name.

The evidence would also establish all of the facts alleged in petitioner's motion to remand the case to the Board to adduce additional evidence.

The petitioner is not seeking this for the purpose of delay, for there is no advantage to be gained by petitioner by delay. As pointed out in the Fifth Ground, *supra*, the delay in this case cannot be entirely blamed on the petitioner.

Since this Honorable Court held that any question of the *bona fides* of the dissolution should be resolved by the Board on "direct resort of it," and since, if the Board entertained any doubt about the *bona fides* of the dissolution, it would have joined in the motion to remand and made the Delaware corporation a party to the proceeding, but did not take this action; but, on the contrary, contested the remanding of the case, it follows, inevitably, that this Honorable Court should enter its judgment

modifying and affirming the judgment of the Circuit Court of Appeals and the order of the Board, such modification to consist of the elimination of the affirmative requirements reflected in Sections 2 (a) and 2 (c) of the Board's order requiring reinstatement and posting of notices and by limiting the make whole order to June 30, 1939.

The Board did not controvert the statements in the affidavit of the petitioner, and the Board contested the application to remand, thereby, apparently, taking the position that it did not question the *bona fides* of the dissolution.

This petitioner respectfully submits that the majority opinion is based on possibilities outside of the record and at the same time is denying the petitioner the right to disprove such possibilities; that a proper judgment would be granted by applying the terms of the law to the facts in the record, rather than the policy of the law to the possibilities outside of the record; that, in order to base judgment on the record, this Honorable Court should eliminate those portions of the order with which this petitioner cannot comply. To do otherwise, would be judicially extending the policy of the law far beyond what is warranted by the facts in the record and the terms of the act.

Prayer.

Wherefore this petitioner earnestly and sincerely prays that this Honorable Court grant this motion for rehearing, withdraw its majority opinion and enter its order remanding this case to the Board or modifying and affirming the order of the Board as set out in the Seventh

Ground hereof; and for such other orders herein, as may be proper.

Respectfully submitted,

HARRY DOW,
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Certificate of Counsel.

I, Harry Dow, hereby certify that I am the attorney and counsel for Southport Petroleum Company, the petitioner in the above-entitled proceeding, and that the foregoing motion for rehearing is not presented for purposes of delay, but is, in my opinion, well founded in law and fact and proper to be filed herein.

Attorney for Southport Petroleum Company, Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1941.

Southport Petroleum Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 19, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner, a Texas corporation, was ordered by the National Labor Relations Board in August of 1938 to cease and desist from unfair labor practices;[1] to offer to reinstate three employees found to have been discriminatorily discharged, and to pay them back pay for the period from the time of discharge to the date of the offer of reinstatement, less earnings during such period; and to post certain notices at its Texas City refinery, where the unfair labor practices had been employed.

The petitioner has never obeyed any of the affirmative directions of the order. In June of 1939 it entered into a written stipulation with the Board that it would obey the order except as it related to back pay, and the Board stipulated on its part that it would accept the performance so promised as sufficient compliance with its order. But the petitioner no more regarded its own promise than it had the Board's command. It finally ceased even to answer communications from the Board, and the latter in April of 1940 filed its petition with the Circuit Court of Appeals for the Fifth Circuit for enforcement of its order.

The petitioner then began the pleas to that court, denial of which it says are errors. Nearly four months after the Board had filed its

[1] Section 1 of the Board's order required that the petitioner cease and desist from:

"(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of

petition, the present petitioner filed an application under § 10(e) of the National Labor Relations Act[2] to adduce additional evidence before the Board. The application stated on the oath of petitioner's president that in June of 1939, three days after petitioner had executed the stipulation of obedience to the Board's order, it distributed all of its assets to its four stockholders as a liquidating dividend, and that the two stockholders who received the Texas City refinery conveyed it to a newly organized Delaware corporation whose stockholders were at no time stockholders of the Texas corporation. It asked that the court order that proof of these facts be taken before the Board or its agent and added to the transcript, and that the court thereupon dismiss the enforcement proceeding. In November of 1940, while this application was pending, it filed an answer to the petition for enforcement, attacking the findings and order of the Board on evidentiary grounds, and also praying that the petition be dismissed because petitioner had been formally dissolved on October 16, 1940, as evidenced by an attached copy of a certificate by the Texas Assistant Secretary of State.[3]

The Circuit Court of Appeals sustained the Board's order and entered a decree directing that it be enforced, thus in effect denying the motion to dismiss and the application for leave to adduce additional evidence. 117 F. 2d 90. We granted certiorari limited

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collective bargaining or other mutual aid or protection, as guaranteed by section 7 of the Act."

We do not consider the question whether, in the rather unusual circumstances of this case, the order should be modified as being unduly broad in this respect, see National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, since this question was not considered or raised in the court below or in the petition for certiorari. Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242; Gunning v. Cooley, 281 U. S. 90, 98; Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 182.

[2] This provides in pertinent part as follows: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript." 49 Stat. 449, 454; 29 U. S. C. (Supp. V) § 160(e).

[3] Texas provides by statute that:

"*Art. 1388. Liquidation by officers.*—Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders and

to the question of the propriety of the denial of the latter because of the general importance of the question. — U. S. —.

We hold that the application for leave to adduce additional evidence pursuant to § 10(e) of the National Labor Relations Act was addressed to the sound judicial discretion of the court and that the denial of petitioner's application under the circumstances disclosed by the record in this case was not error.

To ensure that the applicable part of § 10(e) would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board. The decision below under § 10(e) apparently resulted solely from a belief that the proffered evidence was not "material." Accordingly, we have no occasion to decide whether a Circuit Court of Appeals may in its discretion deny an application under § 10(e) even though it be satisfied that the additional evidence is material and that there were reasonable grounds for failure to adduce it in the hearing before the Board. For the same reason we do not consider the question of the credibility of petitioner's allegations, viewed in the light of its conduct.

The petitioner's conduct does, however, give point to omissions of pertinent facts from its allegations. The record makes it certain that it would gain delay by all honorable means and leaves it doubtful whether it has even stopped at that. The liquidation

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paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.

"*Art. 1389. Extension of existence.*—The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty, to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

"*Art. 1390. Effect of dissolution.*—The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved." 3 Vernon's Annotated Texas Statutes (Civil Statutes).

relied upon took place three days after it had entered into the stipulation of obedience. The purpose to liquidate was not communicated to the Board, nor was the Board advised of the action when taken, nor until nearly four months after the petition for enforcement was filed in the Circuit Court of Appeals.

The statements that the Texas corporation has discontinued operations and that the Delaware corporation has taken over the refinery did not call for recommitment by the Circuit Court of Appeals to the Board for reconsideration of that part of its order which required that the three employees be offered reinstatement. The allegation in the application that the "owners of the stock of Southport Petroleum Company of Delaware, were never the owners of any of the stock of the respondent herein," does not negative either the possibility that the stock in the Delaware corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the Texas corporation or it stockholders, or that its stock was held by straw men. A sworn statement in the answer to the Board's petition that the Delaware corporation "is a separate and distinct entity and the stockholders in respondent have no interest, and never had any interest, directly or indirectly, in the stock ownership of the said Delaware corporation, all as set out in respondent's motion heretofore filed herein," if it adds anything, does not add enough to negative these possibilities, for the court was not required to be satisfied with such conclusions of the petitioner.

Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the offending employer of the refinery to the employment of which the illegally discharged employees were to be restored.[4] Such operation might have continued under the old business form or under a disguise intended to evade this provision. If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience. Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly is a question of fact properly to be

[4] The order required that the employees be reinstated "to their former positions, without prejudice to their seniority and other rights and privileges."

resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.[5]

The additional evidence was immaterial for the further reason that the Board's order ran not only to the petitioner, but also to its "officers, agents, successors, and assigns."[6] Granting the truth of every one of petitioner's allegations, it still is possible that the Board's order may yet be the basis—and the indispensable basis—of liability on the part of any of these persons regardless of any present incapacity of petitioner to perform, or liability on its part for failure to perform, its duty of reinstatement. Of course we do not pass on the question whether any such liability actually exists; all we hold is that there has not been a sufficient showing by the petitioner to negative the possibility which we note.

The petitioner's allegations are immaterial with respect to the back pay provision in the Board's order for like reasons and because some liability in this respect unquestionably exists, although for a disputed period of time. And from what we have said it is apparent that the petitioner has not shown that there has been any change in its relations to the refinery such as to indicate any alteration of the Board's order in respect of its requirements that petitioner post notices at "its Texas City, Texas, refinery", and that it desist from unfair labor practices.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice REED, dissenting.

The record does not lead me to the conclusion that petitioner has taken any improper steps to secure leave to adduce additional evidence, the matter to which the certiorari was limited by our

[5] Such proceedings may be instituted only by the Board. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261.

[6] This is the usual form of order, and has frequently been employed in cases where this Court has sustained Board orders. *E. g.*, Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, enforcing, as modified, 4 N. L. R. B. 71, 108; National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; National Labor Relations Board v. Falk Corporation, 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, enforcing, as modified, and remanding 19 N. L. R. B. 547, 603.

grant. It is plain that the Circuit Court of Appeals did not act on any such ground. Neither the record on that issue nor the Government's brief or argument make any such contention. Only after evidence before the Board would it seem proper for a court to form its opinion of that question.

So far as we now know the petitioner sold its facilities in good faith, after the entry of the Board's order and prior to its motion to remand, thus divesting itself of all interest or control over its former properties. In that situation it asked a remand to the Board to present before the Board the change of conditions because of which it asked a dismissal of the proceedings. § 10(e), 49 Stat. 453. There were two literally unconditional provisions of the order which petitioner, if its allegations are true, could not meet. 2(a) and (c):

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

. . . . . .

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting."

In its brief respondent, it seems to me, admits the correctness of petitioner's view. It says:

"In its application to adduce evidence petitioner alleged that by reason of its distribution of assets and discontinuation of business it could not reinstate any employees. Thereafter in its petition for rehearing in the court below and petition for certiorari in this Court petitioner maintained that it could not do so unless, as it suggested, the order required it to purchase and operate another refinery or otherwise resume business. Properly construed (cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117-118) the order contains no such requirement. Its purpose was to remedy petitioner's violations of the Act by restoring the status quo as it existed prior to the violations, but only to the extent possible under the circumstances existing at the time of compliance, assuming that the circumstances were not changed through any bad faith on petitioner's part. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. 2d 195, 196-197 (C. C. A. 2). That the men were to be offered reinstatement 'to their former positions' is express indication that the reinstatement provision was contingent upon continued operation of the Texas City refinery. This likewise appears

to have been true of paragraph 2(c) of the order requiring the posting of notices 'at its Texas City, Texas, refinery.' "

We cannot treat this suggestion as relieving this petitioner of the threat of contempt proceedings. The statement does not consent to the amendment of the order. Bad faith may still be claimed to exist. This should be determined by the Board. Consequently, I am of the opinion that the decree below should be reversed with directions to sustain the motion for a remand unless the Board agrees to eliminate sections 2(a) and (c) of the order in line with the Board's apparent concession in its brief.

The CHIEF JUSTICE concurs in this dissent.